

301016

**UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
August 24, 2020
Part of
Public Record

EX PARTE NO. 756

MARKET DOMINANCE STREAMLINED APPROACH

**SUPPLEMENTAL PETITION FOR RECONSIDERATION
OF THE CHLORINE INSTITUTE**

Michael F. McBride
Van Ness Feldman, LLP
1050 Thomas Jefferson St., NW
Washington, DC 20007-3877
Telephone: (202) 298-1800
Fax: (202) 338-2416
mfm@vnf.com

Attorney for The Chlorine Institute

Dated: August 24, 2020

Supplemental Petition for Reconsideration of The Chlorine Institute

Pursuant to 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.3, The Chlorine Institute (“CI”) hereby submits a supplemental Petition for Reconsideration in this proceeding pertaining to one aspect of the Board’s decision served August 3, 2020 herein (“August 3, 2020 Decision”), the minimum-mileage requirement of 500 highway miles that is a prerequisite for a shipper using the streamlined market-dominance approach. That requirement is a matter of particular concern to CI’s members.

This Petition is a supplement to the Petition for Reconsideration being filed in this proceeding by American Chemistry Council, *et al.* (“Joint Shippers”) this same day. CI is one of the Joint Shippers. This Supplemental Petition incorporates by reference the Petition for Reconsideration filed herein by Joint Shippers, to avoid repetition.

In the August 3, 2020 Decision, the Board determined that, for a shipper to be able to use the streamlined market-dominance approach, it must meet several standards, including that the shipments in question must move the equivalent of at least 500 highway miles (August 3, 2020 Decision at 9-13), and also that more than 90 percent of the shipments of the commodity over the last five years for the rates being challenged moved by rail (*id.* at 19-20). Various parties (*e.g.*, November 12, 2019 Comments of Olin Corporation at 2, 6-7) challenged the proposed minimum-

mileage standard, including the required minimum length (500 highway miles between origin and destination) of the shipments at issue. August 3, 2020 Decision at 9-13. The Board appears to have conceded that its proposed minimum-mileage standard may not be appropriate and decided to conduct a separate proceeding about whether the minimum mileage should be lower for certain commodities such as chlorine. *Id.* at 13-14. CI believes that there is a simpler approach – either eliminate the minimum-mileage requirement altogether, or at least do so for those commodities and shipments that generally move only by rail in many areas of the country. Doing either might eliminate the need for, or at least simplify, the issues in the separate proceeding the Board intends to commence.

The minimum-mileage standard would eliminate from “streamlined market-dominance consideration” shipments that necessarily move only by rail and, therefore, are market-dominant, but are shorter than 500 highway miles. It is unnecessary to impose a minimum-mileage requirement for consideration of market dominance for movements of commodities that move entirely or almost entirely by rail, and doing so could lead to unjust results. There is a more efficient way to determine which movements are market-dominant, as explained below. The Board’s streamlined market-dominance standards require that a shipper show that more than 90 percent of the shipments of the commodity moved over the last five

years on the routes at issue were shipped by rail. That should be sufficient to make a streamlined market-dominance showing.

This is particularly true for hazardous materials such as chlorine and refrigerated anhydrous hydrogen chloride, two of the commodities produced by members of CI. (It is undoubtedly true for other commodities as well, but CI mentions chlorine and refrigerated anhydrous hydrogen chlorine because those are the commodities of particular interest to CI's members.)

As the Board is aware, when compared to motor carriers, the rail mode is generally the safer mode for transportation of hazardous materials. Moreover, for a variety of historical and commercial reasons, shippers of chlorine, refrigerated anhydrous hydrogen chloride, and other hazardous materials move in rail tank cars that are generally owned or leased by rail shippers, not by the railroads. The fact that shippers own or lease the rail tank cars involved is a further reason that such shipments are market-dominant, regardless of length.

For example, when a pipeline is not available, chlorine shipments from production facilities are all made by rail.¹ Refrigerated anhydrous hydrogen

¹ “As referenced, Olin does not transport any chlorine by truck and neither do most chlorine producers except over very short distances in privately-owned equipment. There are very few commercial motor carriers that handle chlorine. Also, because of the nature of the product, a toxic-by-inhalation hazard (“TIH”), only special bulk trucks can be used, which typically have a capacity of 15-20 tons of chlorine. That means at least five trucks are needed to transport the same volume as one 90-ton railcar. Even if feasible, shifting the transportation of even a modest amount of a

chloride also moves almost entirely by rail.² If a rail shipment of chlorine or anhydrous hydrogen chlorine is, say, only 50, 100, or 200 highway miles, and the pipeline mode is not available, why should that shipper be precluded from using the streamlined approach to market dominance? Generally, the shipments of those commodities are just as captive to rail as are longer shipments. Length of shipment is simply irrelevant when a pipeline is not available, when the producers have long relied entirely on the rail mode for these shipments, and have invested in rail tank cars, rail tracks and sidings, and other rail-related equipment and facilities to accomplish these shipments in cooperation with the railroads.

A better and more efficient standard than a minimum-mileage standard would be whether certain commodities or shipments are essentially constrained to move by rail because of substantial investment by the shipper in rail-related equipment or facilities with respect to the movements at issue. Such a standard would be better and more efficient than the minimum-mileage standard.

Some history is instructive here. When the Board's predecessor the Interstate Commerce Commission ("ICC") first promulgated standards for determining market

TIH material from railcars to massive fleets of trucks traveling the nation's highways is not in the public interest." November 12, 2019 Comments of Olin Corporation at 6-7.

² So far as CI is aware, all refrigerated anhydrous hydrogen chloride that does not move by pipeline moves by rail, regardless of length of shipment, with the possible exception of a few inter-plant shipments.

dominance in the late 1970s, it adopted certain fact patterns or rebuttable presumptions that would establish market dominance unless the presumptions could be rebutted by the Defendant railroad(s). Among those rebuttable presumptions, which operated independently (*i.e.*, a shipper establishing any one or more presumption(s) was presumed to establish market dominance), were two of great relevance here: whether the involved railroad has handled 70 percent or more of the involved traffic or movement during the preceding year, or whether the affected shipper or consignees have made a substantial investment in rail-related equipment or facilities which prevents or makes impractical the use of another carrier or mode for the commodity and shipments at issue.³ There was no minimum-mileage

³ Three of the four fact patterns establishing a rebuttable presumption of market dominance adopted by the ICC are set out below:

- (1) Where the proponent carrier has handled 70 percent or more of the involved traffic or movement during the preceding year; the market share of the proponent will be deemed to include the share of any affiliates, and of any carrier participating in the rate or with whom the proponent carrier has discussed, considered, or approved the rate in issue;
- (2) Where the rate in issue exceeds the variable cost of providing the service by 60 percent or more; and,
- (3) Where affected shippers or consignees have made a substantial investment in rail-related equipment or facilities which prevents or makes impractical the use of another carrier or mode.

See Atchison, Topeka & Santa Fe Rwy. Co. v. ICC, 580 F.2d 623, 628 (D.C. Cir. 1978) (reviewing and upholding ICC's market-dominance rebuttable presumptions).

requirement. The point is that the ICC recognized that if a shipper either shipped most of the involved traffic by rail, or had invested in rail-related equipment or facilities that prevented or made impractical the use of any mode other than rail, market dominance was presumed absent convincing rebuttal by the railroad(s) involved.

CI does not challenge the Board's determination to adopt, as part of its streamlined market-dominance standards, a standard of more than 90 percent of the involved shipments having moved by railroad over the preceding five years, but does contend that the lack of a minimum-mileage requirement in the ICC's original rebuttable presumptions is instructive, especially given that the ICC established a standard of 70 percent of shipments moving by rail over one year. The ICC recognized that shipments might be effectively captive to the rail mode without regard to the distance involved, even where only 70 percent of shipments moved by rail over just the one year preceding the filing of the complaint, and this Board should recognize the same real-world consideration that led the ICC not to adopt a minimum-mileage requirement should lead the Board to conclude that a minimum-mileage requirement ought not be necessary to be eligible for a streamlined market dominance determination, at least for commodities that generally move by rail.

The fourth fact pattern created a rebuttable presumption of market dominance, pertaining to the now-abolished rate bureaus, is not set out here because rate bureaus have been abolished and thus it is not relevant to this discussion.

Such shipments generally move by rail regardless of distance, not just because the rail mode is safer but also because the shippers generally have made substantial investments in rail-related equipment and facilities with regard to the commodity(ies) and movements at issue.

Indeed, the Board's August 3, 2020 Decision is somewhat internally inconsistent in its analysis of this issue. That is, when the Board analyzed the availability of barge transportation (August 3, 2020 Decision at 18-19), it recognized that barges are not necessarily competitive just because there may be a barge landing at a shipper's facility, unless there is a competitive barge option to transport the commodity to destination. In making that determination, the Board did not apply a minimum-mileage requirement, but merely stated that the issue was whether barges were a competitive option regardless of length of movement. So, too, for purposes of streamlined market-dominance determinations, the issue should be, when a pipeline is not available, whether motor carriage is a competitive alternative to the rail mode, and that generally does not depend on length of haul for chlorine and refrigerated anhydrous hydrogen chloride.

The Board should analyze the minimum-mileage standard challenged herein on the same basis that it analyzed the barge option. The issue (again, when a pipeline is not available) is whether motor carriers are competitive to rail transportation. It is evident that, if more than 90 percent of the shipments of the

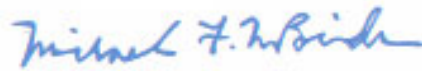
commodity at issue for the routes at issue has moved by rail over the last five years, trucks are not a competitive alternative to rail. This is especially true if the shipper has made significant investments in rail-related equipment and facilities. Imposing an arbitrary, additional minimum-mileage standard would simply eliminate some shipments from the streamlined market-dominance approach even though those shipments are just as captive to the railroads as are shipments longer than whatever arbitrary mileage minimum the Board ultimately adopts.

Stated simply, there is no rational basis for eliminating from streamlined market-dominance presentations shipments that are captive to the rail mode, even if they do not move 500 highway miles (or any lesser arbitrary length of haul). This is especially true where the shipper has made substantial investments in rail-related equipment or facilities for such shipments.

Accordingly, the Board should reconsider its August 3, 2020 Decision, eliminate the minimum-mileage standard, and conclude that shippers who shipped more than 90 percent of the traffic at issue over the previous five years by rail are captive to the rail mode. If the Board is not persuaded that satisfaction of the standard that more than 90 percent of the shipments at issue is alone sufficient to find market dominance (assuming that the standards other than the minimum-mileage standard are also met), it should be willing to conclude that market dominance is proven especially where the shippers have made substantial investment

in rail-related equipment or facilities (such as rail tank cars that the shipper leases or purchases, investment in rail track and sidings, and rail-related loading and unloading equipment). Such investments are made by many CI shippers, whose captivity to the rail mode is most obvious for chlorine and refrigerated anhydrous hydrogen chloride. The same is true of many other commodities, such as grain, coal, and chemicals, which move in railcars owned or leased by the shippers, and as to which shippers have made substantial investments in other rail-related equipment and facilities.

Respectfully submitted,



Michael F. McBride
Van Ness Feldman, LLP
1050 Thomas Jefferson St., NW
Washington, DC 20007-3877
Telephone: (202) 298-1800
Fax: (202) 338-2416
mfm@vnf.com

Attorney for The Chlorine Institute

Dated: August 24, 2020